UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 89-24-P***
	)	***(Civil No. 96-112-P)***
GERMAIN RAMIREZ-FERNANDEZ,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255

Germain Ramirez-Fernandez moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. Ramirez-Fernandez was convicted of conspiracy to possess with intent to distribute in excess of 500 grams of a substance containing cocaine, in violation of 21 U.S.C. § 846, as well as six counts of substantive drug offenses in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) and 18 U.S.C. § 2.[1] The petition challenges all but the sentence imposed in connection with the conspiracy conviction.

A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because 'they are contradicted by the record, inherently incredible, or conclusions rather than

[1] Specifically, Ramirez-Fernandez was convicted of four counts, each alleging possession of cocaine with intent to distribute, aiding and abetting the possession of cocaine with intent to distribute and aiding and abetting the distribution of cocaine (Counts 7, 11, 13 and 14); one count alleging distribution of cocaine (Count 15); and one count alleging possession of cocaine with intent to distribute and aiding and abetting the possession of cocaine with intent to distribute (Count 16). Judgment (Docket No.68) and Indictment (Docket No. 1). The conspiracy charge was Count 1 of the indictment. *Id*. Ramirez-Ferandez was acquitted on Count 8, which alleged possession of cocaine, aiding and abetting the possession of cocaine with intent to distribute and aiding and abetting the distribution of cocaine.

statements of fact.'" *Dziurgot v. Luther*, 879 F.2d 1222, 1225 (1st Cir. 1990) (citation omitted). In this instance, I find that Ramirez-Fernandez's allegations as to four of the five grounds presented in his petition are insufficient to justify relief even if accepted as true, and accordingly I recommend that his motion be denied as to these grounds without an evidentiary hearing. As to the remaining ground -- Ramirez-Fernandez's contention that the court exceeded its statutory authority in imposing five years of supervised release on the non-conspiracy counts -- the government concedes that Ramirez-Fernandez is correct. I agree, and recommend that the sentence be corrected accordingly.

I. Background

As the First Circuit noted on direct appeal of this matter, the underlying criminal case implicated four co-defendants who were involved in the importation of cocaine into Maine from Massachusetts and New Jersey. *United States v. Zuleta-Alvarez*, 922 F.2d 33, 35 (1st Cir. 1990), *cert. denied*, 500 U.S. 927 (1991). Ramirez-Fernandez "was the contact and ring leader in Portland." *Id*.

The case against Ramirez-Fernandez and his three co-defendants was tried to a jury from August 8 to August 16, 1989. At the conclusion of the government's case, Ramirez-Fernandez moved pursuant to Fed. R.Crim. P. 29 for a judgment of acquittal, but only as to Counts 7, 8 and 11. Trial Transcript ("Tr.") at 1071. Ramirez-Fernandez and two of his co-defendants were convicted on the conspiracy charge, Ramirez-Fernandez was convicted on six of the seven pending counts of substantive drug offenses, and the jury returned guilty verdicts as to the non-conspiracy counts pending against the other co-defendants. *Id.* at 1400-1402. Thereafter, the court ordered presentence reports, and subsequently conducted a sentencing hearing at which testimony was taken. *Id.* at 1404, 1406-1538. At the hearing, over the objection of all four co-defendants, the government introduced

transcripts of the testimony of certain grand jury and trial witnesses who were not present at the sentencing hearing for cross-examination. *Zuleta-Alvarez*, 922 F.2d at 35; Tr. at 1409-25. The court sentenced Ramirez-Fernandez to 480 months in connection with the conspiracy count and to 240 months in connection with the remaining counts, all to be served concurrently. *Id.* at 1493-94; Judgment at 2. In addition, the court imposed a five-year term of supervised release in connection with each count of conviction (to run concurrently), a $10,000 fine and special assessments totaling $350. Tr. at 1494; Judgment at 3, 5.

Appeal followed. The appellants, including Ramirez-Fernandez, challenged the manner in which the trial court determined the amount of cocaine involved, which determination formed the basis for the court's calculation of the base offense level under the Sentencing Guidelines. *Zuleta-Alvarez*, 922 F.2d at 35. The co-defendants also argued that the trial court erred in not compelling the production of live witnesses, subject to cross-examination, at the sentencing hearing. *Id*. The First Circuit affirmed, determining that the co-defendants' request for live testimony -- made on the day of the sentencing hearing -- came too late to preserve their right to cross-examine witnesses as to the amount of cocaine involved. *Id*. at 36. Reviewing for clear error, the appellate panel also affirmed the trial court's factual finding as to the amount of cocaine, holding that the evidence of record at the sentencing had "sufficient indicia of reliability to support its probable accuracy," as required by the Guidelines. *Id*. at 36-37. (citation omitted).

The instant section 2255 motion is the second filed by Ramirez-Fernandez. He filed his first motion for post-conviction relief, alleging ineffective assistance of counsel and certain due process violations, in 1993 (Civil Docket No. 93-68-P). The court dismissed the motion without prejudice in July 1993. Two days after Ramirez-Fernandez filed the instant motion, the President signed into

law the Antiterrorism and Effective Death Penalty Act of 1996 ("Antiterrorism Act"), P.L. 104-132, 110 Stat. 1214 (Apr. 24, 1996). Section 105 of the Antiterrorism Act imposes certain restrictions on successive section 2255 motions and creates a one-year limitation period for seeking section 2255 relief. Understandably, the government does not invoke the Antiterrorism Act in support of its position.

II. Sufficiency of the Evidence

The first contention asserted in Ramirez-Fernandez's motion is that his due process rights were violated because the government introduced insufficient evidence at trial to sustain his conviction on one of the non-conspiracy counts (Count 15). Ramirez-Fernandez did not raise this issue at trial by moving for a judgment of acquittal on Count 15 at the close of the government's case. "[T]o obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both (1) 'cause' excusing his double procedural default,[2] and (2) 'actual prejudice' resulting from the errors of which he complains." *United States v. Frady*, 456 U.S. 152, 167-68 (1982) (citations omitted). Ramirez-Fernandez has made no attempt to demonstrate that cause exists for the procedural default, and the court therefore may not consider this claim on collateral review.

III. Period of Supervised Release

[2] The "double procedural default" to which the Supreme Court alludes is the failure to raise an issue at trial and again on direct appeal. Here, the record does not conclusively establish that Ramirez-Fernandez failed to raise a sufficiency-of-the-evidence claim on direct appeal, because the First Circuit's opinion disposes of certain unidentified issues summarily. *Zuleta-Alvarez*, 922 F.2d at 37. If the First Circuit has already disposed of this issue on direct appeal, that fact is itself fatal to the ground when asserted in a section 2255 motion. *See, e.g., United States v. Warner*, 23 F.3d 287, 291 (10th Cir. 1994), *cert. denied*, 134 L.Ed. 2d 108 (1996).

Ramirez-Fernandez next contends that the court erred when it sentenced him to five years of supervised release, following incarceration, on the non-conspiracy counts.[3] The government agrees with Ramirez-Fernandez's contention that the non-conspiracy offenses of which he was convicted are all Class C felonies and, therefore, that the maximum period of supervised release authorized by law is three years pursuant to 18 U.S.C. § 3583(b)(2). I recommend that the judgment be so corrected as to the non-conspiracy offenses.

IV. Double Jeopardy and the Non-Conspiracy Convictions

The third and fifth points raised by Ramirez-Fernandez both attack the non-conspiracy convictions on double jeopardy grounds. His third point attacks the length of the incarceration imposed on these counts, contending that it has the effect of punishing him for a quantity of drugs that had already been taken into account in connection with the sentence on the conspiracy count. His fifth ground challenges the constitutionality of the convictions themselves. I take up these contentions in reverse order.

"[A] substantive crime and a conspiracy to commit that crime are not the 'same offence' for double jeopardy purposes." *United States v. Felix*, 503 U.S. 378, 389 (1992) (quoting Double Jeopardy Clause of the Fifth Amendment). Therefore, no constitutional infirmity lies in Ramirez-Fernandez having been convicted of both the conspiracy and any substantive offenses that may have comprised a part of that conspiracy.

His separate challenge to the amount of punishment imposed on the non-conspiracy counts fails because the 240-month sentence imposed therein is concurrent with the sentence on the

[3] Ramirez-Fernandez does not challenge the imposition of five years of supervised release in connection with the conspiracy conviction.

conspiracy count. A brief review of the Sentencing Guidelines[4] illustrates why Ramirez-Fernandez is incorrect in his assertion that the court twice punished him for the same offense by taking the same 6.721 kilograms[5] of cocaine into account when imposing sentence on both the conspiracy and the non-conspiracy counts.

At the time of Ramirez-Fernandez's sentencing, the Sentencing Guidelines required the court to group closely related counts together and determine a single offense level for each such group. U.S.S.G. § 3D1.1(a) and (b). All counts pending against Ramirez-Fernandez were properly treated as a single group for sentencing purposes. *See id*. at § 3D1.2(d) (counts are grouped together if the offense level is determined largely on the basis of "the quantity of a substance involved"). The court was then to calculate the total punishment for the entire group, based on the factors set forth in the Guidelines. *Id*. at § 5G1.2(b). "If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law." *Id*. at (c).

That is precisely what occurred in this case. The court calculated a single basic offense level of 32, based on the total amount of cocaine involved in all counts on which Ramirez-Fernandez stood convicted. Tr. 1492.[6] The level was adjusted to 42 based on certain aggravating factors and

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[4] All references to specific provisions of the Sentencing Guidelines are to those in effect at the time of Ramirez-Fernandez's November 1989 sentencing.

[5] This is the amount appearing in the court's written findings. Sentencing Findings ("Findings"), appended to Judgment, at 4. At the sentencing hearing itself, the court referred to 6.71 kilograms of cocaine. Tr. at 1492. This slight discrepancy is immaterial because the Guidelines provided for the same base offense level in cases involving at least five kilograms but less than 15 kilograms of cocaine. U.S.S.G. § 2D1.1(c)(6).

[6] Even though the sentencing judge stated that the base offense level was 30, it is apparent he meant to say 32, which is the number that appears in his written findings. Findings at 4; *see also*
(continued...)

an upward departure pursuant to U.S.S.G. § 4A1.3 because the applicable criminal history category did not adequately reflect the seriousness of the defendant's past criminal conduct.[7] Tr. at 1492-93. Accordingly, the court determined that the appropriate Guideline sentencing range was 360 months to life. *Id*. at 1492, 93. Although the court ultimately imposed a sentence of 240 months on the non-conspiracy counts, the statutory maximum for such an offense, *see* 21 U.S.C. § 841(b)(1)(C), it is half the length of the sentence imposed on the conspiracy count.

It is true that the Double Jeopardy Clause of the Fifth Amendment is "designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it." *Witte v. United States*, 115 S.Ct. 2199, 2204 (1995) (internal quotation marks and citation omitted). But it is self-evident that a person serving two sentences concurrently is not being twice punished thereby. The Supreme Court has noted that, for double jeopardy purposes, a second conviction "does not evaporate simply because of the concurrence of the sentence" because such a conviction "has potential adverse collateral consequences that may not be ignored." *Ball v. United States*, 470 U.S. 856, 864-65 (1985); *see also Benton v. Maryland*, 395 U.S. 784, 787-93 (1969) (discussing "concurrent sentence doctrine" as no jurisdictional bar to challenge of second conviction). But, as I have already noted, the fact of Ramirez-Fernandez's conviction on the non-

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[6](...continued)
U.S.S.G. § 2D1.1(a)(3) and (c)(6) (providing for base offense level of 32 in cases involving this quantity of cocaine); *Zuleta-Alvarez*, 922 F.2d at 35. Indeed, in arriving at a total offense level of 42, it is clear the judge started with a base offense level of 32. *See* Tr. at 1492-93.

[7] The court imposed two-level increases for brandishing a firearm during the conspiracy and for attempting to obstruct justice, and imposed a four-level increase because it determined that Ramirez-Fernandez was "the leader and organizer in this conspiracy." Tr. at 1492. The court also denied any credits for acceptance of criminal responsibility. *Id*. Ramirez-Fernandez does not challenge these determinations, nor the determination of his criminal history category or the upward departure.

conspiracy offenses does not amount to double jeopardy, and any adverse collateral consequences flow from these convictions and not from their punishment.

V. Due Process in Calculating the Base Offense Level under the Guidelines

Ramirez-Fernandez next contends that the court violated his right to due process in calculating a base offense level of 32 under the Sentencing Guidelines. Specifically, he invokes case law to the effect that due process guarantees every defendant the right to be sentenced upon information that is not false or materially incorrect. *See, e.g., United States v. Curran*, 926 F.2d 59, 61 (1st Cir. 1991) (citing cases). He maintains that the factual predicate underlying the calculation of his base offense level, i.e., that the quantity of controlled substance attributable to him was 6.721 grams,[8] is not supported by a preponderance of the evidence.

This is precisely the question addressed on direct appeal. The First Circuit determined that the evidence properly adduced at the sentencing hearing contained sufficient "indicia of reliability" to permit the court to accept the government's proposed findings as to the quantities of drugs attributable to each appellant. *Zuleta-Alvarez*, 922 F.2d at 36-37. It is well-established that issues fully litigated on direct appeal may not be raised again in a section 2255 motion. *Murchu v. United States*, 926 F.2d 50, 55 (1st Cir.) (citations omitted), *cert. denied*, 502 U.S. 828 (1991).

VII. Conclusion

For the foregoing reasons, I recommend that the petitioner's sentence be **CORRECTED** to reflect a period of supervised release of three years as to Counts 7, 11, 13, 14, 15 and 16 (concurrent

[8] Ramirez-Fernandez actually refers to a figure of 6.729 kilograms as the one erroneously used by the court. However, as discussed, *supra*, the figure used by the court was 6.721 kilograms and any such minor discrepancy is immaterial.

with the five years of supervised release imposed in connection with Count 1), and that his motion to vacate, set aside or correct his sentence otherwise be **DENIED** without an evidentiary hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 21st day of October, 1996.

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David M. Cohen
United States Magistrate Judge